COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

AUTUMNWOOD, LLC, Appellant	)	
v.	)	No. 05-06
SANDWICH ZONING BOARD OF APPEALS, Appellee	)	

RULING ON MOTION TO DISMISS

AND MOTION FOR CLARIFICATION OF GRANT OR DENIAL

I. PROCEDURAL HISTORY

On March 5, 2004 Autumnwood, LLC (Autumnwood) filed an application for a comprehensive permit with the Sandwich Zoning Board of Appeals (Board) to build two hundred and eighty-nine units on a forty-seven and a half acre lot in the Town of Sandwich. This development would be located near Pin Oak Drive, Discovery Hill Road, and Kiah's Way and received a site approval letter from MassHousing under both the Housing Starts Program and the New England Fund Program. The Board granted Autumnwood's application subject to thirty-five conditions. This decision was recorded by the Town Clerk on February 15, 2005. The conditions of the Board's permit included provisions which require that seventy percent of the land not be developed, and that within the remaining developable area, single family housing

be built on lots no smaller than one third of an acre or, if multifamily housing is built, that the number of units should be the same as could be built by constructing single family units on one-third-acre lots. The decision also forbade the use of Kiah's Way and Discovery Hill Road for the development. Autumnwood appealed the Board's decision by filing an appeal with the Committee on March 4, 2005. This ruling addresses Autumnwood's motion to determine that the Board's grant with conditions is actually a denial, and the Board's motion dismiss for lack of site control, lack of fundability, and failure to meet the Local Action Prerequisite.[1]

II. DISCUSSION

A. Motion to Dismiss

The Board's motion to dismiss relies on three arguments. First, the Board argues that Autumnwood does not have control of the site as required by 760 CMR 31.01(1)(c). Second, Autumnwood did not comply with the requirements of the fundability letter and therefore fails to meet the requirements of 760 CMR 31.01(1)(b) which requires that a project be fundable under an affordable housing program. And finally, it is argued that this appeal should be dismissed because Autumnwood failed to provide enough information at the Board's proceedings. This last argument is made under a number of theories.

The Board argues that Autumnwood does not have site control because it does not have sufficient access rights. Autumnwood proposes to access the site via Pinn Oak Drive, Kiah's Way, Discovery Hill Road, and by connecting the development to Castle Lane by purchasing a property which is between the project and Castle Lane. Autumnwood's claim to use Kiah's Way

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1. The Board requested a full hearing on the motions before the full Committee, but did not explain this request in any of its pleadings. Our regulations provide for hearings on motions. 760 CMR 30.07(1)(a). The presiding officer has discretion to grant or deny such requests. 760 CMR 30.07(1)(a). Because the issues presented by these motions are of the kind routinely argued by briefs alone I find that there is no reason to require more onerous proceedings.

and Discovery Hill Road is based on a theory of prescriptive rights. The Board claims that Kiah's Way and Discovery Hill Road are not currently developed and that Autumnwood has no right to make necessary improvements.

It should first be noted that 760 CMR 31.01(3) specifies that a purchase and sale agreement creates a rebuttable presumption of site control. See 760 CMR 31.01(3), 760 CMR 31.07(1)(b), and *Paragon Residential Properties v. Brookline*, No. 04-16, slip op. at 4 (Mass. Housing Appeals Committee Dec. 1, 2004). This is because site control is matter that is primarily of concern only to the subsidizing agency. *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 10 (Mass. Housing Appeals Committee June 28, 1994) (ruling that site approval letter and acceptance of offer to purchase land for site access was sufficient to establish site control), *aff'd*, No. 94-1706-B (Essex Super. Ct. Jul. 29, 1997). As stated in *Paragon*, the Supreme Judicial court in *Hanover*

> took a practical, rather than a hyper technical, view of a developer's potential interest in a site. See [*Hanover v. Housing Appeals Committee,* 363 Mass. 339, 377, 294 N.E.2d 393 (1973)]. The court noted that the statute "does not explicitly state the requisite property interest necessary to qualify as an applicant for a comprehensive permit, and ruled that the statute does not require an applicant to establish present title." *Id.*

Paragon, No. 90-11, slip op. at 6. Therefore, when the Committee has seen fit to comment on such site control issues, it has only required a colorable claim to title. *Hamilton Housing Authority v. Hamilton Board of Appeals*, No. 86-21, slip op. at 9 (Mass. Housing Appeals Committee Dec. 15, 1988). Furthermore, the committee has emphasized, based on the reasoning in *Hanover*, that the true interest of boards of appeals is ensuring that lingering questions of title are laid to rest before construction begins. *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 378, 294 N.E.2d 393 (1973) (noting that main purpose of inquiring about nature of interest

is to prevent frivolous applicants); *An-Co v. Haverhill*, No. 90-11, slip op. at 11 (Mass. Housing Appeals Committee June 28, 1994), aff'd, No. 94-1706-B (Essex Super. Ct. Jul. 29, 1997).[2]

The Committee has never ruled that as a preliminary, jurisdictional matter, undisputed access to the site is an essential element of control of site. In this case, Autumnwood makes a reasonable claim that it has the right to use several roads to access its site.[3] The Board also argues that Autumnwood has no right to make improvements around an area to which NSTAR has an easement. The letters which Autumnwood has submitted from NSTAR create a question of fact which precludes me from ruling that there is no colorable claim of adequate access.

The Board's second argument for dismissal is that Autumnwood's proposal is not fundable for failure to address environmental concerns as required by Autumnwood's site approval letter. Challenges to site approval letters have been discussed at length by the Committee. See *CMA v. Westborough.* No. 89-25, slip op. at 4-10 (Mass. Housing Appeals Committee June 25, 1992). It is certainly appropriate for the funding agency to address health,

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2. The Board has argued that *Parker v. Black Brook* requires the Committee to dismiss Autumnwood's application for failure to demonstrate site control. See *Parker v. Black Brook*, 61 Mass. App. Ct. 308 (2004). If the Appeals court opinion sought to require applicants to show a definitive property right, the above quote from Hanover establishes that this requirement does not apply to comprehensive permit applicants. Furthermore, the Supreme Judicial Court has held that the Comprehensive Permit law overrides the subdivision control law. *Mahoney v. Board of Appeals of Winchester*, 366 Mass 228, at 232, 316 N.E.2d 606 (1974), appeal dismissed 420 U.S. 903 (1975).

This having been said, it does not seem that the court in *Parker* would require the Committee to make such a determination. The planning board in *Parker* did not consider the right of the developer to use the way which would access the site. See *Coleman v. Hopedale Planning Board*, C.A. No. 263637, slip op. at 11 n. 23 (Land Court Jan. 8, 2003) *rev'd sub nom. Parker v. Black Brook*, 61 Mass. App. Ct. 308 (2004). Furthermore, before the Appeals Court, Black Brook argued that the board and the courts have no authority to consider questions to its right to use the way. *Parker* at 310. The Appeals Court decision is best understood as affirming the Planning Board's ability to consider access issues, and upholding the Land Court's determination after finding that the way in fact was not a public way that the plan as a whole had to be annulled. Such an interpretation would complement the Supreme Judicial Court's and the Committee's understanding of how to consider title issues within the Comprehensive Permit process.

3. The contention of the Board that ways on abutting existing projects created pursuant to a comprehensive permit cannot be modified at this proceeding is answered by our reasoning in *Cloverleaf Apartments v. Natick*, No. 01-21, slip op. at 7 n. 3 (Mass. Housing Appeals Committee Dec. 23, 2002).

safety, and design issues such as the environmental issues raised in Autumnwood's approval letter because the funding agency has a responsibility to ensure that the projects it supports are well designed. See *CMA*, slip op. at 6. However, "the central role of the comprehensive permit process is to determine whether such local requirements are reasonable, and to the extent a local board and the MHFA differ on such questions, the MHFA is bound by the outcome of the comprehensive permit process." *CMA*, slip op. at 6. In this case, if the Board feels that any of the requirements of Autumnwood's site approval regarding health, safety, and design issues were not properly addressed before it previously, the Board's course of action is to challenge these issues on their merits during the Committee's hearing.

Further, the requirement of site approval is an outgrowth of the requirement that a project be fundable in order to apply for a comprehensive permit. *Farmview v. Sandwich*, No. 02-32, slip op. at 2 (Mass. Housing Appeals Committee May 21, 2004). Normally, evidence about the fundability of a project, outside of evidence concerning the status of the project before the subsidizing agency, is not to be heard. 760 CMR 31.07(4)(a). While the site approval letter may establish fundability under 760 CMR 31.01, another major purpose of the letter is to set the terms for final subsidy approval by the subsidizing agency. Any conditions beyond that required by a potential comprehensive permit are between the funding agency and Autumnwood. If the allegation is that there is not enough information on an issue that was before the Board, the Board's course of action is to address this issue directly as Committee proceedings are *de novo*. *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 370, 294 N.E.2d 393 (1973). On the other hand, if the allegation is that not enough discussion took place at the Board to meet the requirements of the approval letter, that is a matter between the developer and

subsidizing agency when the developer applies for final approval after all permits have been issued.

The Board's third argument for dismissal is based on a contention that Autumnwood refused to provide information regarding engineering, traffic, and economic issues during the Board's hearing. The discussion above explains why this argument cannot rest on requirements from the eligibility letter. The Board also argues that lack of communication means that Autumnwood has failed to establish a *prima facie* case under 760 CMR 31.06(2). This argument is misplaced as Board proceedings are informal and 760 CMR 31.06(2) is only meant to be used during the Committee's formal hearing process.[4] Finally, the Board alleges that Autumnwood failed to satisfy the Local Action Prerequisite. 760 CMR 31.02. Section 31.02(2) lists some items which normally constitute a complete description of the proposed project, but the ultimate test is whether the board had enough information to make a decision. *CMA v. Westborough*. No. 89-25, slip op. at 12 (Mass. Housing Appeals Committee June 25, 1992). In this case as in *CMA*, "the best indication of whether there was sufficient information before the Board is the Board's decision itself." *CMA*, slip op at 13, 14. In this case, the Board claims that there was inadequate information on engineering, traffic, and economic issues. Economics are not properly before the Board. (See below.) Condition five of the Board's permit provided a process to ensure that there is a final review of Autumnwood's plans. Condition nine and twenty-one addressed groundwater issues. And numerous conditions addressed traffic issues of this project. It is apparent that the Board had sufficient information to address the issues created by Autumnwood's application.

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4. Autumnwood can not be expected to establish a prima facie case before us at this stage of the proceeding because neither party has begun to present evidence yet.

Since the Board's arguments regarding site control, project eligibility, and the applicant's level of cooperation have not be persuasive, its motion to dismiss is not allowed.

B. Motion to Clarify if Board's Decision is a Grant with Conditions or a Denial

Autumnwood's motion regarding grant or denial argues pursuant to 760 CMR 30.07(2)(d) that there is no logical nexus between the conditions of the permit granted by the Board and legitimate local concerns. In particular, Autumnwood alleges that the conditions related to traffic, density, and endangered species are not justified and result in a dramatic and unreasonable reduction in the size of the proposal. The Committee has ruled that when there is no reasonable basis for a Board's dramatic reduction in a proposal, such action will be treated as a denial for the purposes of 40B. *Settlers Landing v. Barnstable*, No. 01-08, (Mass. Housing Appeals Committee Sept. 22, 2003).[5] This in turn affects burdens of proof for hearings before the Committee. 760 CMR 31.06.

The Board's comprehensive permit only allowed Autumnwood to build on 30% of the site. This condition was added to address concerns voiced by the Assistant Director of the Division of Fisheries and Wildlife in a letter presented during the local hearing. The Assistant Director has information which indicates the possible presence of the eastern box turtle, a species of special concern under the Massachusetts Endangered Species Act (G.L. c. 131A), on the site. It seems that the Division of Fisheries and Wildlife believes that the most appropriate way to handle this issue is to either perform extensive studies to determine if the turtle is present or simply reduce the scope of development to large degree. The Board responded by limiting the amount of land that Autumnwood could develop to 30% of the site. This restriction may be a

5. The Board reserves its right to challenge the holding of *Settlers Landing*.

reasonable response to the turtle issue, but there is no argument from the Board that this concern has been previously regulated by the Town of Sandwich, and it seems that Division of Fisheries and Wildlife is actively engaged in a process to ensure that State environmental laws are followed. Therefore I find that this condition was not reasonable. *Cirsan Realty Trust v. Woburn*, No. 01-22, slip op. at 5 n. 5 (Mass. Housing Appeals Committee June 11, 2003) ("in the absence of exceptional circumstances, we are reluctant to consider local concerns that the town has not previously chosen to regulate"), and *Walega v. Acushnet*, No. 89-17 (Mass. Housing Appeals Committee Nov. 14, 1990) (Committee considered local issues not previously regulated at the local level because concern was pressing and no other body was addressing the concern).

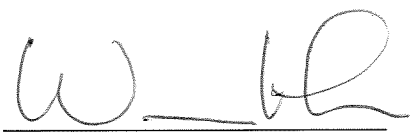
The Board also conditioned its permit to restrict the density of development to mirror the surrounding subdivisions. In defense of this condition, the Board argues that towns may restrict density as much as possible so long as the project remains economic. To the contrary, the Board must approve or reject a project as it is submitted. *CMA v. Westborough*, No. 89-25, slip op. at 24 (Mass. Housing Appeals Committee June 25, 1992). Just because a project could be economic at a smaller size does not mean that it should be reduced in size. *Hastings Village v. Wellesley*, No. 95-05, slip op. at 17 (Mass. Housing Appeals Committee Jan. 8, 1998). The size of a project will be reduced only if required by legitimate local concerns. *CMA* at 24. The economics of a project only affect the burdens of proof when a local board approves a comprehensive permit subject to conditions. 760 CMR 31.06. In that case, if an applicant proves that conditions make the proposal uneconomic the local board has essential the same burden as if it had denied the proposal. 760 CMR 31.06(6), (7). The Board points to no authority which supports its proposition that the role of the local board is to determine how small a proposed project can be made while remaining economic. The better understanding of the

Comprehensive Permit law is that local board's decision should weigh local concerns against the need for affordable housing. *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 364-365, 294 N.E.2d 393 (1973). If a local board considers the economics of a project, this inquiry will only be useful for anticipating the burden shifting procedures of the Committee. 760 CMR 31.06(6), (7).

The Committee agrees that valid local concerns, such as municipal services, traffic, aesthetics, and overall livability of the surrounding neighborhood, can be affected by density. *Hastings Village*, No. 95-05, slip op. at 20 (Mass. Housing Appeals Committee Jan. 8, 1998). For a board's regulation of density to be reasonable, it must address such concerns. There is insufficient support in the Board's decision to justify its density condition.

To its credit, the Board has not arbitrarily specified a particular number of units in the permit. Its condition addressing the eastern box turtle situation is tailored to address the issue directly, and its condition addressing density only regulates that issue. However, as we have seen, neither condition is based on valid local concerns. The effect of these conditions is a radical reduction in the number of units that can be built. The Board has failed to articulate a reasonable basis for the dramatic reduction in the amount of land that could be developed. The permit is deemed to be a *de facto* denial of Autumnwood's application, and burdens of proof during the hearing before the Committee will be allocated accordingly, pursuant to 760 CMR 31.06.

Housing Appeals Committee



Date: November 4, 2005

Werner Lohe
Presiding Officer

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